IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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107 MAP 2023

BOWFIN KEYCON HOLDINGS, LLC, *et al.*,

Petitioners-Appellees

v.

PENNSYLVANIA DEPARTMENT OF ENVIRONMENTAL PROTECTION AND PENNSYLVANIA ENVIRONMENTAL QUALITY BOARD,

Respondents-Appellants

Appeal from the Order of the Commonwealth Court at No. 247 M.D. 2022, entered on November 1, 2023

BRIEF OF AMICI CURIAE PENNSYLVANIA MANUFACTURERS' ASSOCIATION, INDUSTRIAL ENERGY CONSUMERS OF PENNSYLVANIA, PENNSYLVANIA ENERGY CONSUMER ALLIANCE, PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS, INC., IN SUPPORT OF PETITIONERS-APPELLEES

Charles O. Beckley, II (Pa. 47564)
Thomas S. Beckley (Pa. 77040)
BECKLEY & MADDEN, LLC
212 North Third Street, Suite 301
Harrisburg, Pennsylvania 17101
Tel: (717) 233-7691; Fax: (717) 233-3740

Attorneys for Amici Curiae

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I. INTRODUCTION

Last year, Pennsylvania's Independent Fiscal Office estimated that, based on an auction price of $12.50 per allowance, the Department of Environmental Protection's ("DEP") sale of 55 million allowances through the Regional Greenhouse Gas Initiative ("RGGI") auctions would generate proceeds of $688,000,000 during the 2023-2024 fiscal year.[1] The actual average auction price per allowance for the four auctions held between September, 2023, and June, 2024, rose to $16.44, meaning DEP would have generated $904,200,000 had Pennsylvania participated in the RGGI auctions.[2] In the 2023-2024 fiscal year, the General Assembly appropriated $202,953,000 for all of DEP's operations, not just the air quality program. The RGGI auctions would have raised additional revenue in an amount equal to four-and-a-half times DEP's entire budget.

At the most recent auction on September 4, 2024, the price for a CO_2 allowance hit $25.75. *Id.* At that price, DEP's annual take could exceed 1.25 billion dollars. DEP needs only six percent of the funds collected to administer the RGGI program, and wants to use the surplus hundreds of millions of dollars each year to

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[1] ifo.state.pa.us/download.cfm?file=Resources/Documents/IFO_Hearing_Materials_March_2023.pdf, p. 15.

[2] *RGGI Auction Results, Allowance Prices and Volumes*, https://www.rggi.org/Auctions/Auction-Results/Prices-Volumes

fund programs which DEP has yet to conceived or implement. DEP will raise the money first, then decide how to spend it.

It has long been the law in Pennsylvania that a fee imposed by an administrative agency must bear a reasonable relationship to the cost of regulation. If the fee raises revenue disproportionate in amount to the cost of regulation, then it is a tax, and only the General Assembly may levy taxes.

The Commonwealth Court recognized that the amount of money generated by the allowance auctions would be "'grossly disproportionate' to the costs of overseeing participation in the program or DEP's and EQB's annual regulatory needs...." *Ziadeh v. Pennsylvania Legislative Reference Bureau*, 2023 WL 7170737, p. *6 (Pa. Cmwlth. 2023); *Bowfin Keycon Holdings, LLC v. Pennsylvania Department of Environmental Protection*, 2023 WL 717547, p. *5 (Pa. Cmwlth. 2023). For this reason, pursuant to longstanding Pennsylvania precedent, the Commonwealth Court held that the requirement to purchase CO_2 allowances upon which the RGGI regulation depends is a tax, not a fee.

As Chief Justice John Marshall observed, more than 200 years ago: "That the power to tax involves the power to destroy" is a "proposition[] not to be denied." *M'Culloch v. State of Maryland*, 17 U.S. 316, 431 (1819). By imposing a carbon tax on fossil fuel-fired generators of electricity, DEP unabashedly hopes to drive these generators out of business, while at the same time collecting hundreds of

millions of dollars per year to spend as it wishes, without legislative guidance. If allowed to proceed, DEP will drive up the already increasing price of electricity in Pennsylvania; it will make the Commonwealth less competitive and cause businesses to relocate to neighboring states not participating in RGGI, like Ohio and West Virginia; and it will undermine Pennsylvania's role as an energy-exporter. As the Commonwealth Court correctly concluded, this kind of foundational change in the Commonwealth's economy should come only through legislation enacted by our elected General Assembly.

The Pennsylvania Manufacturers' Association, Industrial Energy Consumers of Pennsylvania, the Pennsylvania Energy Consumer Alliance, the Pennsylvania Chamber of Business and Industry and the National Federation of Independent Business, Inc., respectfully submit this brief as *amici curiae* in support of Appellees, the Senate Intervenors and the Bowfin Petitioners, and urge the Court to affirm the Commonwealth Court's orders entered in *Ziadeh* and *Bowfin* enjoining the implementation of the RGGI regulation.[3]

[3] Pursuant to Pa.R.A.P. 531(b)(2), *amici* state that no party, counsel for a party, or person other than *amici*, their members or counsel authored any portion of this brief or made any monetary contribution intended to fund this brief's preparation and submission.

II. STATEMENT OF INTEREST

Since 1909, the Pennsylvania Manufacturers' Association ("PMA") has served as a leading voice for Pennsylvania manufacturing, its 540,000 employees, and the millions of additional jobs in supporting industries. PMA seeks to improve the Commonwealth's competitiveness by promoting pro-growth public policies that reduce the cost of creating and keeping jobs in Pennsylvania. PMA advocates for forward-looking strategies that will ensure a secure, stable supply of market-priced energy for Pennsylvania's businesses and citizenry.

Founded in 1982, Industrial Energy Consumers of Pennsylvania ("IECPA") is an association of large, energy-intensive, trade-exposed industrial entities. Its members are "energy-intensive" because they consume large amounts of energy, which means that small changes in energy rates can lead to large increases in cost. Its members are "trade-exposed" because they cannot pass cost increases on to customers without risking the loss of those customers to global competition. As a voice for large energy consumers in Pennsylvania, IECPA has played a critical role in the restructuring of the electric and natural gas industries and supports and promotes competitive energy markets and regulatory structures that facilitate consumers' use of those markets.

The Pennsylvania Energy Consumer Alliance's ("PECA") members include businesses, manufacturers, colleges and other organizations that support pro-growth

energy policies in the Commonwealth in order to keep energy costs in Pennsylvania at competitive levels for large energy consumers. PECA focuses its efforts on ensuring that the leaders of Pennsylvania's government (1) understand the impact that energy and energy policy has on business, (2) prioritize the importance of energy to Pennsylvania's economy, and (3) balance legislative and regulatory initiatives to enhance opportunities for business growth in the Commonwealth.

The Pennsylvania Chamber of Business and Industry ("PA Chamber") is the largest broad-based business association in Pennsylvania. Its close to 10,000 member businesses employ more than half of the Commonwealth's private workforce, and range from sole proprietorships to mid-size and large companies. The PA Chamber works to foster public policy that will expand private-sector job creation, promote an improved and stable business climate, and enhance economic development for the benefit of all Pennsylvania citizens.

The National Federation of Independent Business, Inc. ("NFIB"), is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. NFIB's mission is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents thousands of Pennsylvania small businesses, spanning virtually every sector of the Commonwealth's economy. Small businesses consistently rank energy-related costs as a significant obstacle to maintaining their operations.

III. SUMMARY OF ARGUMENT

The requirement to purchase CO_2 allowances that the Department of Environmental Protection and the Environmental Quality Board (hereinafter referred to collectively as "DEP") seek to impose on fossil fuel-fired generators of electricity is not a "fee." It is a tax, designed to generate hundreds of millions of dollars of revenue each year for DEP to "invest" in yet-to-be-identified projects. Despite DEP's assertion to the contrary, Section 6.3(a) of the Air Pollution Control Act does not authorize it to assess this new carbon tax. Interpreting Section 6.3(a) as DEP suggests would render it unconstitutional as an unlawful delegation of the legislative taxing power and, in effect, turn DEP into an unelected, self-funding fiefdom.

Similarly, Article I, Section 27, of the Pennsylvania constitution, commonly known as the Environmental Rights Amendment, does not confer upon DEP the authority to impose a carbon tax. Pennsylvania's constitution vests the General Assembly with the right to impose taxes. As an administrative agency, DEP may exercise only the powers conferred upon it by statute, and the General Assembly has yet to enact a law authorizing DEP to implement a carbon tax. The ERA does not purport to alter the structure of our Commonwealth's government by empowering an unelected administrative agency to levy a tax.

Through substantially higher electricity rates, electric generators required to purchase allowances will pass on the cost of DEP's new carbon tax to the thousands of businesses represented by *amici curiae*. This will (1) irreparably harm the manufacturers and other industrial and commercial users forced to pay those higher rates with no hope of recovering their increased costs, (2) permanently damage the Commonwealth's competitive position by rendering it more difficult for Pennsylvania to retain existing businesses and attract new ones, and (3) damage Pennsylvania's status as an energy exporter by promoting the establishment of competing electric generating facilities in neighboring non-RGGI states like Ohio and West Virginia, which in turn, through "leakage," will rob the Commonwealth of the benefit of any emissions reductions which RGGI hopes to achieve. As the Commonwealth Court recognized, a tectonic shift in Pennsylvania's economy of the magnitude represented by the RGGI regulation should only be made by a law duly enacted by our elected General Assembly.

For these reasons, *amici curiae* respectfully request the Court to affirm the orders issued by the Commonwealth Court in *Ziadeh*[4] and *Bowfin*, and permanently enjoin the implementation of the RGGI regulation.

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[4] Jessica Shirley has replaced Ramez Ziadeh as the Acting Secretary of the Department of Environmental Protection and the Acting Chairperson of the Environmental Quality Board.

IV. ARGUMENT

A. RGGI'S REQUIREMENT THAT FOSSIL FUEL-FIRED ELECTRICITY GENERATORS PURCHASE CO_2 ALLOWANCES TO REMAIN IN BUSINESS CONSTITUTES THE IMPOSITION OF AN UNLAWFUL TAX

1. The Requirement to Purchase Allowances Is a Tax, Not a Fee

As a condition of obtaining and maintaining a permit to operate a "CO_2 budget unit," the RGGI Regulation requires the operator of a fossil fuel-fired electricity generator to purchase "one CO_2 allowance for each ton of CO_2 emitted from the budget unit each year."[5] 25 Pa. Code § 145.306 (c)(2). This is the linchpin of the RGGI program. By compelling fossil fuel-fired electricity generators to make the Hobson's choice of collectively spending hundreds of millions of dollars per year on CO_2 allowances or shutting down, DEP hopes to reduce greenhouse gas emissions by forcing these generators out of business.

DEP currently contends that the funds generated by the purchase of allowances are "fees" authorized by Section 6.3(a) of the Air Pollution Control Act ("APCA"), 35 P.S. § 4006.3(a), to "support" DEP's air pollution control program.[6]

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[5] A "CO_2 budget unit" is defined as "a unit that serves an electricity generator with a nameplate capacity equal to or greater than 25 MWe" which supplies more than 10 percent of its annual gross generation to the electric grid. 25 Pa. Code §§ 145.304(a) and 145.305(a)

[6] Perhaps reflecting the difficulty of its position, DEP's characterization of RGGI's mandate to purchase CO_2 allowances has evolved during the course of this litigation:

(*Brief of Appellant*, 106 MAP 2023, p. 19, 107 MAP 2023, p. 18). The auction revenue is not a fee to "support" DEP's air pollution control program, however, because the programs that the auction proceeds would pay for have yet to be established or even envisioned. As DEP previously argued at the preliminary injunction hearing, for fossil fuel-fired generators of electricity, the requirement to purchase CO_2 allowances is a license fee – it is the price DEP wants them to pay for the privilege of staying in business.

This Court set forth the "distinguishing features" of a license fee 70 years ago in *National Biscuit Co. v. City of Philadelphia*, 374 Pa. 604, 98 A.2d 182 (1953):

> The distinguishing features of a license fee are (1) that it is applicable only to a type of business or occupation which is subject to supervision and regulation by the licensing authority under its police power; (2) that such supervision and regulation are in fact conducted by the licensing authority; (3) that the payment of the fee is a condition upon which the

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- In its brief filed on April 25, 2022, in opposition to the Senate Intervenors' application for preliminary injunction, DEP argued that "[t]he primary purpose of a licensing fee is to defray the cost of administering a regulatory program, whereas the primary purpose of a tax is to generate revenue unrelated to such costs. The charges associated with purchase of an emissions allowance under the RGGI Regulation, however, fall into *neither* category." (*Petitioner's Brief in Opposition to Senate Intervenor Respondents' Application for Special Relief in the Nature of a Preliminary Injunction*, p. 20) (emphasis in original).

- At the preliminary injunction hearing before the Commonwealth Court on May 10, 2022, Counsel for DEP stated that "[t]he other issue is whether this [requirement to purchase allowances] is a tax. Your Honor, this is a license fee....You don't have to emit carbon. But under the regulation if you do emit it, you have to buy the allowance to do so. That's a license. It's a license fee." (N.T., May 10, 2022, p. 30, lines 5-6, 12-15).

> licensee is permitted to transact his business or pursue his occupation; and (4) that the legislative purpose in exacting the charge is to reimburse the licensing authority for the expense of the supervision and regulation conducted by it.

National Biscuit Co. 374 Pa. at 615-616, 98 A.2d at 188. *See also Mastrangelo v. Buckley*, 433 Pa. 352, 386, 250 A.2d 447, 464 (1969) (A license fee "must be commensurate with the expense incurred...in connection with the issuance and supervision of the license or privilege.").

As the Commonwealth Court has explained repeatedly, in order to be a valid license fee, the fee must bear some reasonable relationship to the cost of regulation; if it raises an amount of revenue disproportionate to the cost of regulation, then it is a tax:

> A license fee is distinguishable from a tax which is a revenue producing measure characterized by the production of a high proportion of income relative to the costs of collection and supervision. Thus, if a license fee collects more than an amount commensurate with the expense of administering the license, it would become a tax revenue and cease to be a valid license fee.

Thompson v. City of Altoona Code Appeals Board, 934 A.2d 130, 133 (Pa. Cmwlth. 2007) (citations omitted). *See also, e.g., Costa v. City of Allentown*, 153 A.3d 1159, 1165 (Pa. Cmwlth 2017), *appeal denied* 643 Pa. 108 ("[A] license fee will be struck down if its amount is 'grossly disproportionate to the sum required to pay the cost of the due regulation of the business.'") (quotation omitted); *Commonwealth v. Tobin*, 828 A.2d 415, 424-425 (Pa. Cmwlth. 2003), *appeal denied* 576 Pa. 726 ("An

administrative fee may be charged to defray the cost of inspections. But, such a fee cannot be a revenue raising measure or it is an invalid tax.") (citations omitted); *City of Philadelphia v. Southeastern Pennsylvania Transportation Authority*, 303 A.2d 247, 251 (Pa. Cmwlth. 1973) ("The common distinction is that taxes are revenue-producing measures authorized under the taxing power of government; while license fees are regulatory measures intended to cover the cost of administering a regulatory scheme authorized under the police power of government.").

It does not matter what the charge is called. "[I]t is the nature and apparent purpose of the charge which controls its classification." *National Biscuit Co.*, 374 Pa. at 626-627, 98 A.2d at 193. *See also White v. Commonwealth of Pennsylvania, Medical Professional Liability Catastrophe Loss Fund*, 571 A.2d 9, 11 (Pa. Cmwlth. 1990) ("The question of whether an enactment is a tax or regulatory measure is determined by the purposes for which it is enacted and not by its title."). "[T]he crucial factor" in determining whether a particular charge "constitutes a valid regulatory fee is whether the charge is intended to cover the cost of administering a regulatory scheme or providing a service." *Rizzo v. City of Philadelphia*, 668 A.2d 236, 239 (Pa. Cmwlth. 1995).

"Thus, if a license fee collects more than an amount commensurate with the expense of administering the license, it would become a tax revenue and cease to be a valid license fee." *Talley v. Commonwealth of Pennsylvania*, 553 A.2d 518, 519

(Pa. Cmwlth 1989). *See also Greenacres Apartments, Inc. v. Bristol Township*, 482 A.2d 1356, 1359 (Pa. Cmwlth. 1984) ("A license fee, of course, is a charge which is imposed...for the privilege of performing certain acts, and which is intended to defray the expense of regulation. It is to be distinguished from a tax, or revenue producing measure, which is characterized by the production of large income and a high proportion of income relative to the costs of collection and supervision.").

The sale of the allowances will generate an enormous amount of revenue for DEP. DEP initially projected that, in RGGI's first year, the sale of 61 million CO_2 allowances would generate approximately $198 million of income. 52 Pa.B. No. 17, p. 2509. This figure was based on an estimated price of $3.24 cents per allowance. *Id.* At the December 6, 2023, auction, however, the sale price per allowance was $14.88; at the March 13, 2024, auction, the sale price per allowance rose to $16.00; at the June 5, 2024, auction, the sale price per allowance jumped to $21.03; and at the September 4, 2024, auction the price hit $25.75.[7] At the four auctions held during the last year, the average sale price per allowance has been $19.42, six times DEP's original estimate.

Since Governor Wolf initiated the RGGI rulemaking process on October 3, 2019, the allowance price has increased by almost 400 percent, from $5.20 at the

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[7] *RGGI Auction Results, Allowance Prices and Volumes*, https://www.rggi.org/Auctions/Auction-Results/Prices-Volumes.

September 4, 2019, auction to $25.75 at the September 4, 2024, auction.[8] Using the $13.50 allowance price from the March 9, 2022, auction, the Commonwealth's Independent Fiscal Office estimated that the approximately 58 million allowances that DEP expected to sell during the first year of the program's operation would yield revenue in the amount of approximately $781 million.[9] Using the $19.42 average price per allowance during the last year, based on 58 million allowances sold the revenue figure swells to over $1.125 billion.

DEP estimates that only six percent of the auction proceeds will be needed "for any programmatic costs related to administration and oversight of the CO_2 Budget Trading Program (5% for the Department and 1% for RGGI, Inc.)." 52 Pa.B. No. 17, p. 2508. Accordingly, if the sale of allowances generates $1.125 billion in income in the program's first year, only six percent of that amount, or $67.5 million, would be used "to defray the expense of regulation." *Greenacres*, 482 A.2d at 1359. $1.057 billion would remain at DEP's disposal. To put this amount of money in perspective, it represents approximately 2.2 percent of the Commonwealth's entire $47,598,974,000.00 budget for 2024-2025; it is more than four times the General

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[8] *RGGI Auction Results, Allowance Prices and Volumes*, https://www.rggi.org/Auctions/Auction-Results/Prices-Volumes.

[9] (*March 29, 2002, Testimony of Matthew Knittel, Director of the Independent Fiscal Office, Before the Joint Hearing of the Senate Environmental Resources and Energy and Community, Economic and Recreational Development Committees*, community.pasenategop.com/wp-content/uploads/sites/56/2022/03/knittel-rev.pdf).

Assembly's $232,144,000.00 appropriation to DEP for 2024-2025; and it is more than the General Assembly's 2024-2025 appropriations for DEP, the Department of Health ($252,067,000.00), the Department of Agriculture ($261,266,000.00), the Department of Conservation and Natural Resources ($175,368,000) and the Department of Labor and Industry ($94,993,000.00) combined.[10]

Under the long-established case law relating to the imposition of fees, the RGGI regulation's requirement that fossil fuel-fired electric generators purchase CO_2 allowances cannot constitute a "fee" when that "fee" bears no reasonable relationship to the cost of administering the RGGI program. It is, rather, a revenue-generating tax, designed to produce hundreds of millions of dollars annually for DEP to use as it sees fit. As recognized by the Commonwealth Court:

> Where, as here, the moneys generated and received by the Commonwealth's participation in the auctions are 'grossly disproportionate' to the costs of overseeing participation in the program or DEP's and EQB's annual regulatory needs, and relate to activities beyond their regulatory authority, the regulations authorizing Pennsylvania's participation in RGGI are invalid and unenforceable.

(*Ziadeh*, 2023 WL 7170737, at p. *6; *Bowfin*, 2023 WL 7171547, at p. *4). *See also, e.g., Costa*, 153 A.3d at 1165 ("[A] license fee will be struck down if its amount is 'grossly disproportionate to the sum required to pay the cost of the due regulation of

[10]budget.pa.gov/Publications%20and%20Reports/CommonwealthBudget/Documens/2024-25%20Budget%20Documents/Enacted%20Tracking%20Run%20207-11-2024.pdf

the business.'"); *Tobin*, 828 A.2d at 424-425 ("An administrative fee may be charged to defray the cost of inspections. But, such a fee cannot be a revenue raising measure or it is an invalid tax.") (citations omitted); *Talley*, 553 A.2d at 519 ("Thus, if a license fee collects more than an amount commensurate with the expense of administering the license, it would become a tax revenue and cease to be a valid license fee.").

In its brief, DEP attempts to rely on *White v. Commonwealth of Pennsylvania, Medical Professional Liability Catastrophe Loss Fund*, *supra*, to support its argument that the mandate to purchase allowances constitutes a fee and not a tax. In *White*, a physician challenged an annual surcharge placed on health care providers to fund a "contingency fund" created by Section 1301.701((e) of the Health Care Services Malpractice Act, 40 P.S. § 1301.701(e)(1), to pay "awards, judgments and settlements for loss or damages" that exceeded the amount of the provider's malpractice insurance. *White*, 571 A.2d at 568-569. The Act set the surcharge at "'an amount sufficient to reimburse the fund for the payment of all claims paid and expenses incurred during the preceding calendar year and to provide an amount necessary to maintain an additional $15,000,000.'" *White*, 571 A.2d at 569 (quoting 40 P.S. § 1301.701(e)).

Unlike RGGI's mandate to purchase CO_2 allowances, the contingency fund at issue in *White* was established by statute, not by regulation. And while the fund's

director set the amount of the annual surcharge, subject to the Insurance Commissioner's approval, the Act set forth the formula for determining the fee. The Court held that the surcharge was a fee and not a tax because "[i]n addition to the expense involved in administering the Fund, a part of the cost of supervision and regulation is the actual payment of claims to patients," and that, "viewed in the context of the total legislative scheme of the Act, the surcharge does meet the requirements set forth in *National Biscuit*." *White*, 571 A.2d at 571 A.2d at 573 (footnote omitted).

By contrast, in this case the Commonwealth Court found that the hundreds of millions of dollars which the allowance auctions would generate annually – more than four times DEP's annual appropriation from the General Assembly – are "'grossly disproportionate'" not only to the cost of administering the RGGI program, but also to "*DEP's and EQB's annual regulatory needs....*". *Ziadeh*, 2023 WL 7170737, at p. *6; *Bowfin*, 2023 WL 7171547, at p. *4 (emphasis added). *White* not only does not support DEP's position, but, given the Commonwealth Court's finding that the proceeds of the allowance auctions would be grossly disproportionate to DEP's annual regulatory needs, *White* is consistent with the Commonwealth Court's reasoning.[11]

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[11]In its brief, DEP also attempts to rely on *California Chamber of Commerce v. State Air Resources Board*, 216 Cal. Rptr. 3d 694 (Cal. App. 5th 2017), but the cap-and-trade program at issue in *California Chamber* was promulgated pursuant to an

Additionally, as the Commonwealth Court observed, "there is no cited authority under which DEP and EQB may obtain or retain the auction proceeds for Pennsylvania allowances that are purchased by non-Pennsylvania sources, which are not subject to DEP's and EQB's regulatory authority, and which are not tethered to CO_2 emissions in Pennsylvania...." *Ziadeh*, 2023 WL 7170737 at p. *6; *Bowfin*, 2023 WL 7171547, at p. *4.

The Commonwealth Court understood that Section 6.3(a) of APCA does not authorize DEP to collect funds from entities outside of Pennsylvania which DEP does not regulate and over which it has no jurisdiction. The ability of non-Pennsylvanians to purchase Pennsylvania allowances further removes RGGI's mandate to purchase CO_2 allowances from *National Biscuit's* formulation of the distinguishing features of a license fee, since DEP (1) has no ability to regulate, (2) will not regulate, and (3) will incur no expense to regulate fossil fuel-fired generators of electricity whose facilities are situated outside the Commonwealth.

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enabling act; it included legislation directing how auction proceeds were to be spent; the program operated differently; and the case was decided under California law, the principal issue being whether the cap-and-trade program constituted a tax within the meaning of California's Proposition 13. *Genon Mid-Atlantic v. Montgomery County, Maryland*, 630 F.3d 102 (4th Cir. 2011), also cited by DEP, involved a fee imposed by the elected Montgomery County Council, not by regulation, and *Selective Way Insurance Company v. Commonwealth of Pennsylvania*, 1 A.3d 950 (Pa. Cmwlth. 2010) dealt with the application of a retaliatory tax *statute*, not a regulation. None of these cases support DEP's contention that RGGI's requirement to purchase allowances is a permissible fee and not a tax.

RGGI's requirement to purchase allowances imposes a tax, not a fee. By its plain language, Section 6.3(a) of APCA only permits the imposition of "fees." The Commonwealth Court properly applied this Commonwealth's longstanding caselaw concerning what constitutes a permissible fee, and its orders permanently enjoining the implementation of the RGGI regulation should be affirmed.

2. Section 6.3(a) of APCA Does Not Authorize DEP to Impose a Carbon Tax

Article 2, Section 1 of Pennsylvania's Constitution vests the legislative power of the Commonwealth "in a General Assembly, which shall consist of a Senate and a House of Representatives." Pa. Const. Art. II, § 1. "[T]he power to tax is a legislative power...." *William Penn Parking Garage, Inc. v. City of Pittsburgh*, 464 A.2d 168, 218, 346 A.2d 269, 294 (1975). *See also Mastrangelo*, 433 Pa. at 362-363, 250 A.2d at 452 ("The power of taxation, in all forms and of whatever nature lies solely in the General Assembly of the Commonwealth acting under the aegis of our Constitution."); *Wilson v. School District of Philadelphia*, 328 Pa. 225, 229, 195 A. 90, 94 (1937) ("The taxing power, one of the highest prerogatives, if not the highest, of the Legislature, must be exercised through representatives chosen by the people.").

"The framers of the Constitution believed that the integrity of the legislative function was vital to the preservation of liberty." *Protz v. Workers' Compensation Appeal Board (Derry Area School District)*, 639 Pa. 645, 655, 161 A.3d 827, 833

(2017). Although the General Assembly may confer on another body the discretion to execute a law, the power to do so "is subject to two principal limitations: (1) the basic policy choices must be made by the Legislature; and (2) the 'legislation must contain adequate standards which will guide and restrain the exercise of the delegated administrative functions.'" *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth of Pennsylvania*, 583 Pa. 275, 333, 877 A.2d 383, 418 (2005) (quotation omitted); *See also Protz*, 639 Pa. at 656, 161 A.3d at 834 (same). "Such standards both articulate the 'basic policy choices' made by the General Assembly and serve to confine the exercise of discretion, thus guarding against its arbitrary exercise." *William Penn*, 464 Pa. at 168, 346 A.2d at 292.

Only six cents out of every dollar of the carbon tax which DEP seeks to levy is needed to pay the cost of administering the RGGI program. Section 6.3(a) contains no guidelines for how DEP should spend the other 94 cents of every dollar of revenue generated by the "fee." DEP says it might use the allowance auction revenue for "investments" in "energy efficiency initiatives," like "upgrading appliances and lighting, weatherizing and insulating buildings, upgrading HVAC and improving industrial processes," "abandoned oil and gas well plugging" and "vocational trainings, among others." 52 Pa.B. No. 17, p. 2508.[12] DEP's own

[12] As IECPA noted in its submission to the Independent Regulatory Review Commission ("IRRC"), Pennsylvania already has a robust energy efficiency and conservation regime, implemented by the Pennsylvania Public Utility Commission,

regulation relating to the use of funds deposited into the Clean Air Fund contains the only apparent limit on DEP's discretion to spend as much as $900 million of newfound money each year. 25 Pa. Code § 143.1. But Section 143.1 really contains no limits at all, since it provides that "the full and normal range of activities of the Department shall be considered to contribute to the elimination of air pollution...."25 Pa. Code 143.1(b).

DEP has acknowledged that the General Assembly provided DEP with no guidance or parameters concerning how to spend the hundreds of millions of dollars of revenue it stands to collect – as noted above, an amount potentially more than four times DEP's 2024-2025 appropriation – by stating that it "plans to develop a draft plan for public comment outlining reinvestment options separate from this final-form rulemaking." 52 PA.B. No. 17, p. 2507. DEP plans to develop "a set of Guiding Principles and a final strategy document that will be used to guide the Department's implementation of this final-form rulemaking, including the investment of auction proceeds in projects that benefit communities dependent on fossil-fuel fired EGU's." 52Pa.B. No. 17, p. 2491.

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which has cost Pennsylvania's energy consumers well over $2 billion since its inception in 2009, with over $1 billion of the expense coming from the large industrial and manufacturing community alone. *August 10, 2021, IEPCA Submission to IRRC*, p. 5.

In other words, the allowance fees are not going to "support" DEP's air pollution program, as required by Section 6.3(a) of APCA. Instead, DEP intends to use the revenue that the auctions will generate to drive and justify the creation of new programs which heretofore did not exist. The revenue does not support the programs; the revenue begets the programs.

These judgments concerning how to use the revenue generated by a new carbon tax, however, are constitutionally mandated to be made by elected, politically-accountable legislators. Section 6.3(a) of the APCA, upon which DEP relies for its authority to impose a carbon tax, contains none of the guidelines or limits on DEP's exercise of its discretion that are required by the non-delegation doctrine. *See, e.g., West Philadelphia Achievement Charter Elementary School v. The School District of Philadelphia*, 635 Pa. 127, 140-141, 132 A.2d 957, 965-966 (2016) ("The Distress Law also lacks any mechanism to limit the SRC's actions so as to 'protect[] against administrative arbitrariness and caprice.'...This is a substantial deficiency because this Court has generally viewed the inclusion of such limitations as a necessary condition to satisfy the non-delegation rule.") (citations and quotation omitted).

If the Court were to hold, as DEP urges, that Section 6.3(a) of APCA authorizes DEP to impose a tax in the form of the mandate to purchase CO_2 allowances, such a holding would render Section 6.3(a) unconstitutional, as an

improper delegation of legislative authority. This the Court should not do. The Court should instead affirm the Commonwealth's determination that the requirement to purchase CO_2 allowances is not the kind of "fee" that Section 6.3(a) permits DEP to impose. *See* 1 Pa.C.S. § 1922 (3) ("[T]he General Assembly does not intend to violate the Constitution...of this Commonwealth."). *See also, e.g., Commonwealth v. McClelland*, 233 A.3d 717, 735 (Pa. 2020) ("'[W]hen a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter'.") (quotation omitted).

If the Court were to interpret Section 6.3(a) as DEP requests, it is difficult to see where DEP's power to tax would end. If DEP can tax fossil fuel-fired power plants, then presumably DEP can tax gasoline and diesel-powered vehicles, as well as farm equipment, locomotives, jet airplanes or even a backyard grill. There are well over 10,000,000 cars, trucks and motorcycles registered in Pennsylvania, only about 100,000 of which are electric.[13] If we assume that most vehicles log at least 10,000 miles per year, and if DEP were to impose a fee of $10.00 for every 1,000 miles driven, then that "fee" alone would generate more than a billion dollars a year of revenue. The ability to raise that kind of money would transform DEP into a self-

[13]dot.state.pa.us/public/DVSPubsForms/BMV/Registration%20Reports/ReportsofRegistration2023.pdf

funding, unelected fiefdom. Said differently, funds raised by DEP through a carbon tax could more than replace the General Assembly's annual appropriation to DEP from the General Fund since, according to DEP's own regulation, the "full and normal range" of DEP's activities "contribute to the elimination of air pollution...." 25 Pa. Code 143(b).

Taken to its logical limit, DEP contends that Section 6.3(a) confers upon it the power to reshape the economy in fundamental ways through the imposition of a carbon tax. Despite DEP's assertion that the RGGI regulation "is not a policy decision of such a substantial nature that it requires legislative review," 52 Pa.B. No. 17, p. 2496, surely this is precisely the kind of basic policy choice which should be made in the first instance by our elected General Assembly, which did not delegate that authority to DEP in Section 6.3(a) of APCA.

3. The Environmental Rights Amendment Does Not Authorize DEP to Impose a Carbon Tax

It is axiomatic that "'Commonwealth agencies have no inherent power to make law or otherwise bind the public or regulated entities. Rather, an administrative agency may do so only in the fashion authorized by the General Assembly[.]'" *Marcellus Shale Coalition v. Department of Environmental Protection*, 292 A.3d 921, 927 (Pa. 2023) (quoting *Nw. Youth Servs., Inc. v. Commonwealth Dep't of Pub. Welfare*, 620 Pa. 140, 66 A.3d 301, 310 (2013). *See also, e.g., Aetna Casualty and Surety Company v. Commonwealth of Pennsylvania,*

Insurance Department, 536 Pa. 105, 118, 638 A.2d 194, 200 (1994) ("'[A]n administrative agency can only exercise those powers which have been conferred upon it by the Legislature in clear and unmistakable language.'" (quoting *Commonwealth, Human Relations Commission v. Transit Casualty Insurance Company*, 478 Pa. 430, 438, 387 A.2d 58, 62 (1978).

Article 1, Section 27, of Pennsylvania's constitution sets forth what has become known as the Environmental Rights Amendment ("ERA") and provides as follows:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pa. Const. Art. 1, § 27. This Court has held that the ERA "created a constitutional public trust" of which the "Commonwealth acts as a trustee managing the corpus...." *Pennsylvania Environmental Defense Foundation v. Commonwealth of Pennsylvania*, 667 Pa. 179, 184, 219, 255 A.3d 289, 292, 313 (2021).

What the ERA does not do, however, is authorize DEP to implement a carbon tax through the RGGI regulation. Nothing in the ERA's language specifically authorizes DEP to promulgate the RGGI regulation and, more importantly, nothing in the ERA suggests that it was intended to overrule existing case law concerning the difference between a fee and a tax, or to alter the fundamental framework of our

Commonwealth's government. More to the point, nothing in the ERA redistributes the power to levy taxes from the General Assembly to DEP or any other administrative agency.

The ERA does not authorize the imposition of a carbon tax through the RGGI regulation, which explains why DEP has never argued that it does. As the Commonwealth Court held, if Pennsylvania is to enter into RGGI, it must do so at the impetus of the General Assembly.

4. Ultimately, the Commonwealth's Consumers of Electricity Will Bear the Burden of DEP's Unlawful Carbon Tax

As DEP itself has recognized, electricity generators forced to purchase CO_2 allowances or lose their investment in their business will "most likely incorporate this compliance cost into their offer price for electricity. The price of electricity is then passed onto electric consumers." 52 PA.B. No. 17, p. 2500. In short, RGGI will raise the price of electricity in Pennsylvania because generators will pass the cost of purchasing CO_2 allowances along to their customers.

While DEP has predicted fairly modest increases, as noted by Matthew Knittel, the Director of the Independent Fiscal Office, DEP based those predictions on its flawed assumption that the auction price per allowance would be only $3.57.[14] As noted above, over the course of the last four auctions, the price per allowance has

[14] Community.pasenategop.com/wp-content/uploads/sites/56/2022/03/knittel-rev.pdf.

averaged $19.42, more than five times what DEP anticipated, and at the September, 2024, auction the price reached $25.75. Consequently, electricity prices can be expected to increase by more than five times what DEP initially estimated.

DEP's carbon tax will fall on the backs of all consumers, but it will hurt the manufacturers and industrial and commercial users of large quantities of electricity represented by *amici* the most. IECPA estimates that, due to the increase in the auction price of CO_2 allowances, the total annual increase in electricity costs in the Commonwealth, including residential, commercial and industrial users, could approach $870 million per year. This represents a projected annual increase for a large manufacturer of the kind represented by IECPA and PECA of roughly $2.7 million per year, which equates to more than 30 manufacturing jobs and 160 supporting jobs for a single large business.

For many of the manufacturers represented by PMA, energy costs are their single largest monthly expense. NFIB has found that, for approximately 35 percent of small businesses, energy constitutes one of their top three expenses, and concerns small businesses more than cash flow, poor earnings, and training and managing employees. Each year, America's small businesses, including sole proprietorships, spend close to 60 billion dollars on energy. These are not costs that can be easily passed on to consumers in a normal environment, let alone an inflationary one.

Likewise, because many of IECPA's and PECA's large industrial users are "trade-exposed," they cannot pass increased electricity costs on to their customers without risking the loss of those customers to global competitors not burdened by a carbon tax. And these "global" competitors are not limited to off-shore companies. If the Commonwealth implements RGGI, Pennsylvania's businesses will now also have to compete with companies in neighboring non-RGGI states which do not have their energy costs artificially inflated by a carbon tax. These costs also threaten to rob manufacturers and industrial users of the resources needed to incorporate clean-air and other environmentally beneficial technologies into their operations.

The PA Chamber believes strongly that Pennsylvania should maintain its position as an energy leader, and that Pennsylvania's status as an energy exporter should not be undermined by regulatory fiat. The Commonwealth has made historic progress on reducing carbon emissions, while at the same time preserving energy choice. Any change in the makeup of Pennsylvania's energy economy of the kind contemplated by the RGGI regulation should come only through legislative action. Reliable, reasonably-priced sources of energy play a critical role in sustaining a competitive environment for Pennsylvania's businesses of all sizes.

RGGI threatens to convert Pennsylvania from a state with relatively low electricity rates compared to its neighboring states to a state with artificially high energy costs, which will directly affect the Commonwealth's ability to attract and

retain businesses. As IECPA stated in its comments on the RGGI rulemaking submitted to the IRRC, "IECPA is very concerned that adoption of any proposed regulations to comply with RGGI will jeopardize the survival of manufacturing and industrial concerns in Pennsylvania." *August 10, 2021, IEPCA Submission to IRRC*, p. 7. PECA stated in its comments to the IRRC that "as many PECA members have also heavily invested in cogeneration units and CHP systems, the Proposed Rulemaking may have unduly punitive effects on such businesses and a chilling effect on additional investment in such systems, which provide measurable efficiency and environmental benefits to the Commonwealth." *January 14, 2021 PECA Submission to IRRC*, p. 2.

PMA echoed these concerns in its submission to the IRRC, noting that "[a]dding on additional costs will drive manufacturing out of Pennsylvania and make it exceedingly difficult to bring new firms in; essentially making RGGI a hard cap on economic growth in the manufacturing sector....We lose the jobs, we lose the power, and we all pay more for no environmental benefit." *August 25, 2021, PMA Submission to IRRC*, p. 3.

V. CONCLUSION

Whether attempting to reduce greenhouse gas emissions represents good policy is not before this Court. Neither is whether good intentions motivated Governor Wolf's desire to enter into RGGI. To paraphrase what Chief Justice Taft observed a century ago with regard to unconstitutional legislation:

> The good sought in unconstitutional [regulation] is an insidious feature, because it leads citizens and [regulators] of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards.

Bailey v. Drexel Furniture Co., 259 U.S. 20, 37, 42 S.Ct. 449, 451 (1922).

If Pennsylvania is to enter into the Regional Greenhouse Gas Initiative, then that decision should be made by the elected members of the General Assembly, not an administrative agency. The Commonwealth Court got it right:

> Stated simply, to pass constitutional muster, the Commonwealth's participation in RGGI may only be achieved through legislation duly enacted by the Pennsylvania General Assembly, and not merely through the Rulemaking promulgated by DEP and EQB.

Ziadeh, 2023 WL 7170737, at p. *6; *Bowfin*, 2023 WL 7171547, at P. *5.

For all of the foregoing reasons, the thousands of businesses large and small represented by *amici curiae* respectfully request the Court to affirm the orders of the Commonwealth Court permanently enjoining the implementation of the RGGI regulation.

Dated: September 9, 2024

Respectfully submitted,

Charles O. Beckley, II, Esquire
Attorney I.D. No. 47564
Thomas S. Beckley, Esquire
Attorney I.D. No. 77040
BECKLEY & MADDEN, LLC
212 North Third Street, Suite 301
Harrisburg, Pennsylvania 17101
(717) 233-7691 (telephone)
(717) 233-3740 (facsimile)
cbeckley@pa.net
becks@pa.net

CERTIFICATE OF WORD COUNT

I, Charles O. Beckley, II, certify that the foregoing brief contains fewer than 7,000 words, which complies with Pa.R.A.P. 531(b)(3).

Dated: September 9, 2024

Charles O. Beckley, II

CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the United Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Dated: September 9, 2024

Charles O. Beckley, II

PROOF OF SERVICE

I hereby certify that I have caused a true and correct copy of the foregoing Brief to be served on the parties to this matter via the Court's PACFile system.

Dated: September 9, 2024

Charles O. Beckley, II